

February 18, 1999

**OFFICE OF THE HEARING EXAMINER  
KING COUNTY, WASHINGTON**

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**REPORT AND DECISION ON AN APPEAL FROM THRESHOLD DETERMINATION**

SUBJECT: Department of Development and Environmental Services File Nos. **B98C0011/E98E0026**  
Department of Transportation File Nos. **95-05-22-01 & 97-11-12-01**

**COLINA SQUARE APARTMENTS**

Appeal of SEPA Threshold Determination and  
Review of Transportation Concurrency Determination

Location: Northwest corner of the intersection of 228<sup>th</sup> Avenue SE  
and SE 29<sup>th</sup> Street on the Sammamish Plateau

Applicant: Colina Square, L.L.C., *represented by*  
**Robert Johns, Esq. & Michael Monroe, Esq.**  
701 Fifth Avenue, #3600, Seattle, WA 98104-7081

Appellant: Friends of Pine Lake, *represented by*  
**Richard Aramburu, Esq.** **Ilene Stahl**  
505 Madison Street, #209 21533 SE 28th Lane  
Seattle, Washington 98104 Issaquah, WA 98029

King County: Department of Development & Environmental Services, *represented by*  
**Angelica Velasquez**, 900 Oakesdale Avenue SW, Renton, WA 98055

King County: Department of Transportation, *represented by*  
**Dick Etherington**, 821 Second Avenue, Seattle, WA 98104

Intervenor: Park at Pine Lake Homeowners Association, *represented by*  
**Terry Gray**, 22733 SE 27th Street, Issaquah, WA 98029

**SUMMARY:**

DDES Preliminary Recommendation:	Deny SEPA Appeal
DDES Final Recommendation:	Deny SEPA Appeal
Examiner's Decision:	SEPA Appeal Denied

KCDOT Preliminary:	Affirm Concurrency
KCDOT Final:	Affirm Concurrency
Examiner's Decision:	Concurrency Affirmed

## PRELIMINARY MATTERS:

Notice of appeal received by Examiner:	September 9, 1998
Statement of appeal received by Examiner:	September 9, 1998

## EXAMINER PROCEEDINGS:

Pre-Hearing Conference:	September 24, 1998
Motions Hearing:	October 19, 1998
Second Pre-Hearing Conference:	October 27, 1998
Hearing Opened:	February 2, 1999
Hearing Continued:	February 3, 1999
Hearing Closed:	February 3, 1999

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

## ISSUES/TOPICS ADDRESSED:

- |                                   |                         |                              |
|-----------------------------------|-------------------------|------------------------------|
| • Buffers                         | • Groundwater           | • Surface Water Detention    |
| • Concurrency                     | • Road Capacity         | • Surface Water Drainage     |
| • Downstream Impacts              | • Road Design           | • Traffic Impacts Mitigation |
| • Erosion                         | • Road Improvements     | • Water Quality              |
| • Lakes                           | • Storm Water Detention | • Wetlands                   |
| • Mitigation System Payment (MPS) |                         |                              |

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

## FINDINGS:

1. **General Information.**

Location:	NW corner of intersection of 228 <sup>th</sup> Ave SE and SE 29 <sup>th</sup> Street
Applicant:	Colina Square, L.L.C., <i>represented by</i> Robert Johns, Esq. & Michael Monroe, Esq. 701 Fifth Avenue, #3600, Seattle, WA 98104-7081
Appellant:	Friends of Pine Lake, <i>represented by</i> Ilene Stahl, 21533 SE 28th Lane, Issaquah, WA 98029 <i>assisted by</i> Richard Aramburu, Esq., 505 Madison Street #209, Seattle, WA 98104
Intervenor:	Park at Pine Lake Homeowners Association, <i>represented by</i> Terry Gray, 22733 SE 27th Street, Issaquah, WA 98029

STR: SE/NE 09-24-06  
 Zoning: R-18  
 Project: Construction of a 36-unit Apartment complex associated with parking  
 Community Plan: East Sammamish

2. **Proposal.** Tim Cowan and Colina Square, LLC (the “Applicant”) proposes to develop a 36-unit apartment complex, comprising four buildings with associated parking. The subject property comprises the northwest corner of the 228<sup>th</sup> Avenue SE/SE 29<sup>th</sup> Street intersection in the East Sammamish Community Planning area. See also exhibit No. 10.
3. **SEPA Threshold Determination.** On July 17, 1998 the Department of Development and Environmental Services (the “Department” or “DDES”) published a mitigated determination of non-significance (MDNS), incorporated in this hearing record as exhibit No. 2. The regulatory text of the MDNS is stated also on page 2 of the Department’s report to the Hearing Examiner prepared for the February 2, 1999 hearing on the appeal (exhibit No. 1). The MDNS requires the Applicant to install certain specified stormwater treatment systems designed to remove 50% of the annual average phosphorus concentration before discharge to Lake Sammamish or its tributaries (either natural or engineered). Among the “Notes” contained in the published MDNS are the Department’s observations that the proposed development will not generate thirty peak hour trips and therefore will not meet the King County threshold for requiring a traffic study. Following standard procedure, access and frontage improvement requirements will be addressed prior to building permit issuance.
4. **Appeal.** On August 7, 1998, Ilene Stahl filed timely appeal from the Department’s threshold determination of non-significance (mitigated) on behalf of Friends Of Pine Lake (the “Appellant”). Following an October 27, 1998 pre-hearing conference, the areas of concern at issue were these:
  - impacts upon earth
  - shoreline
  - air quality
  - wetland
  - schools
  - water
  - traffic

These issue areas are addressed further in findings Nos. 6.A through 6.F, below.

The Park at Pine Lake Homeowners Association, represented by Terry Gray, subsequently intervened in support of the appeals, particularly regarding downstream water impacts.

5. **Department Recommendation.** The Department (in association with KCDOT), having considered all testimony and evidence offered through the course of the hearing, stands by its original threshold determination and its preliminary recommendation to the Examiner: Deny the SEPA appeal and affirm the Transportation Concurrency Determination.
6. **Relevant Findings.** Although the hearing record in this case is relatively voluminous, the essential and necessary facts are clear and few.

**A. Earth Impacts (Erosion And Sediment Control).** The proposed development will be required to satisfy the erosion and sediment control measures established by the 1998 King County Surface Water Design Manual—particularly requirement No. 5. This “core requirement” establishes minimum standards for clearing limits, temporary and permanent cover measures, perimeter protection, traffic area stabilization, sediment retention, interception of all surface water from disturbed areas, dust control,

wet season construction limits, special limits upon any disturbance within a class one or two wetland associated buffer, as well as maintenance and final stabilization.

Appeal argument is based principally upon an internal preliminary field investigation report which indicates that special precautions will need to be taken with respect to erosion and sedimentation control. The DDES review engineer assigned to this project was fully aware of the preliminary investigation report and considered it when evaluating the plans presented by the Applicant and the conditions of development contained in core requirement No. 5. The hearing record contains no factual support for any argument that the analysis of the review engineer or the controls imposed by core requirement No. 5 are insufficient to mitigate probable erosion and sedimentation impacts from the proposed development. In fact, it is not clear from the hearing record that the Appellants ever considered the contents of core requirement No. 5. Their argument relies instead upon a *preliminary* field investigation conducted by a junior employee whose responsibility is to alert senior staff to possible problem areas.

**B. Air Quality.** The statement of appeal asserts that “air quality will be impacted by increases in traffic and use of wood burning devices.” In hearing, the Appellant did not pursue this position. In fact, the record shows that wood burning devices are not a part of the proposal.

**C. Impacts Affecting Storm Water Quantities, Shorelines and Wetlands.** A wetland is located within the property abutting the north boundary of the subject property. The conceptual drainage plan calls for discharge of treated water from the retention/detention and treatment facilities on the subject property which are required to be constructed by the Applicant. The wetland at issue, referred to here as the “Todd’s Landing Wetland,” drains through a 15-inch diameter pipeline from the wetland 391.56-foot elevation. The appeal, and the intervention of Park at Pine Lake Homeowners Association (the “Intervenor”), expresses concern regarding the potential impacts of the proposed development upon the Todd’s Landing Wetland and, more importantly, upon residential properties surrounding that wetland. However, the 100-year flood plain for the wetland is at 392.8-foot elevation. Moreover, the surrounding homes are situated at 394-foot elevation or higher. Although many of these surrounding home sites experience wet—even standing water conditions—during the rainy season, the hearing record contains no evidence that the wetland is capable of rising to such high elevations. In other words, the water conditions experienced by those surrounding home owners cannot be due to the wetland unless the 15-inch drain pipe becomes so plugged that the flood elevation rises 1 to 2 feet above the 100-year flood level according to the expert testimony in the hearing record. Such a circumstance is not inconceivable. However, there is no evidence in the hearing record that such conditions actually occur. And, in any event, if such occurrences do indeed transpire, then the solution must be found with the King County Surface Water Management maintenance program, not with a neighboring development.

More fundamental than the surface water discussion above must be consideration of the actual impacts of the proposed development. The Applicant, both by SEPA law and by King County Surface Water Management Design Manual standards, cannot be held responsible for mitigating down-stream circumstances that the Applicant did not create. Rather, drainage analysis must consider whether the proposed development

will create a probable unmitigated significant adverse impact. In this case, the highly complex drainage requirements place upon the Applicant may be summarized in this way: The peak storm discharge rate shall not exceed one-half of the peak storm discharge rate under pre-development conditions. This regulatory requirement means that, during peak storm conditions, the Todd's Landing Wetland will be receiving less water than it does today. The decreased peak storm flow into Todd's Landing Wetland may not be significant or observable, however, because the Colina Square property comprises only a portion of the tributary basin.

Another aspect of the contested drainage review concerns Pine Lake. Property owners along the Pine Lake shoreline have experienced obviously unacceptable flood levels during the past decade. Those increased flooding conditions, of course, cannot be attributed to the proposed development. However, just as in the case of Todd's Landing, the record must show that the proposed development will not *create* a probable significant adverse impact upon the environment. And, just as in the case of Todd's Landing Wetland, the discharge rate (at ½ the pre-development rate) during peak storm periods must be taken into consideration. The Pine Lake situation is more complex, however. The record does not show the area of the Pine Lake basin or the lake level accretion during and following peak storm events. It is conceivable that the delay in storm water discharge (caused by the highly rigorous detention requirement imposed on such developments as Colina Square) could coincide with the post-storm rise in the Pine Lake surface level. However, the Appellants have not posed this argument and the hearing record contains no information by which to examine it.

**D. Impacts Affecting Water Quality And Shorelines.** Located within the East Lake Sammamish drainage sub-basin, the proposed development is required to install treatment facilities that have been deemed by King County Water and Land Resources Division to be necessary to achieve the King County goal of reducing phosphorus content by fifty percent. This requirement, providing the Applicant alternative approaches, all of which have been approved by the King County Water and Land Resources Division, is contained in the MDNS. The hearing record contains no evidence suggesting that the choices imposed upon the Applicant are insufficient to achieve the phosphorus reduction goals of the County or that a probable significant adverse impact would result following implementation of any of these mandatory alternative design approaches.

Algal blooms in lake water typically result from excess nutrients. The principal culprit nutrient at issue is phosphorus. Observation of Pine Lake algal bloom behavior, in conjunction with academic research, easily leads to the finding that the autumn and early winter algal blooms experienced by Pine Lake substantially result from storm water runoff from impervious surfaces within the Pine Lake basin. However, the hearing record contains no evidence that the offending runoff has been treated in the same manner as the MDNS requires of this Applicant. In fact, the record suggests quite the contrary; that most developments existing within the Pine Lake basin preceded adoption of the current fifty percent phosphorus removal standard imposed upon this Applicant and upon other more recent developments within the Sammamish basin.

Pine Lake is considerably smaller than Lake Sammamish. Presumably, its bathymetry, volume, storage capacity as a proportion of basin area, and flushing rate all differ from those same categories of characteristic for Lake Sammamish.

Thus, it is conceivable, that a phosphorus reduction standard which is appropriate for the Lake Sammamish basin may not be appropriate for the Pine Lake basin. However, no evidence has been offered by any party on this point.

**E. Impacts Affecting Traffic and Traffic Concurrency.** Based upon Institute of Traffic Engineers (ITE) standards, the King County Department of Transportation (KCDOT) has determined that this project will not generate 30 or more peak-hour peak-direction trips through any intersection, let alone through any critical intersection. Consequently, due to the project's relatively small size, it fails to trigger any special traffic study requirement contained in County regulations.

The Appellant contests issuance of certificate of concurrency granted to the Colina Square project by KCDOT. The Appellant argues that the project fails to meet the County concurrency standard by virtue of a segment of East Lake Sammamish Parkway SE located south of Southeast 43<sup>rd</sup> Street (which provides access to the Sammamish Plateau from East Lake Sammamish Parkway SE). The only Transportation Certificate of Concurrency legitimately contested in this review was issued November 18, 1997. This certification issuance was based upon a wholly new concurrency analysis, thereby rendering irrelevant any previous analysis conducted with respect to this property. The analysis on which the November 18, 1997 concurrency certificate is based considered the number of lanes, the intersection function(s) at SE 43<sup>rd</sup> Street, shoulder conditions and other similar circumstances affecting traffic movement. These circumstances tend to increase the calculated capacity of East Lake Sammamish Parkway SE. Although the hearing record indicates some disagreement between the Appellant and KCDOT regarding the appropriate calculated capacity of East Lake Sammamish Parkway SE, both the *volume to capacity ratios* used by the parties and *capacity* expressed as vehicles per hour used by the parties, even when different, indicate that the link capacity is sufficient to justify concurrency certification for Colina Square.

Regarding traffic in the immediate vicinity, the Applicant will be required to satisfy several requirements before occupancy. First, the property frontage must be developed consistent with King County Road Standards (KCRS). This requirement probably will be addressed by the King County Department of Transportation itself, leaving the Applicant responsible only for contributing its fair monetary proportional contribution to KCDOT improvements scheduled for those streets that abut the Colina Square property. In addition, the Applicant will be required to make mitigation payments to the "Mitigation Payment System (MPS)," a system that requires the Applicant to financially contribute a fair-share proportion to planned street improvement projects in the vicinity (zone) of the proposed development. The KCDOT planned improvements will provide turn lanes at the 228<sup>th</sup> Avenue SE/SE 29<sup>th</sup> Street intersection (abutting the subject property) in order to assure safe and orderly traffic movement. Although the Appellant questions the adequacy of these required and scheduled improvements, the hearing record contains no competing traffic engineering analysis which would support a finding that the mitigating measure required of the Applicant and planned by KCDOT will not adequately mitigate traffic impacts generated by the proposed development.

**F. School Enrollment Impact.** Although contained in the notice of appeal, and accepted in the pre-hearing order, the Appellant did not pursue the school enrollment issue in hearing. School enrollment capacity, impacts and fees depend upon a set of

regulations and procedures adopted by the school district and by King County. The framework for this system is contained in KCC 21A.28 and KCC 27.44. There is no indication in this hearing record that these standards and procedures fail to properly assess school enrollment impact or fail to properly mitigate projected impact. Further, the record contains no indication that these standards and procedures were misapplied in the case of Colina Square.

7. **Review Standards.** Section D of the Department's February 2, 1999 Preliminary Report to the King County Hearing Examiner (Exhibit No. 1) cites the scope and standard of review to be considered by the Examiner. The Department's summary is correct and will be used here. In addition, the following review standards apply:

A. WAC 197-11-350(1), -330(1)(c), and -660(1)(3). Each authorize the lead agency (in this case, the Land Use Services Division), when making threshold determinations, to consider mitigating measures that the agency or Applicant will implement or mitigating measures which other agencies (whether local, state or federal) would require and enforce for mitigation of an identified significant impact.

B. RCW 43.21C.075(3)(d) and KCC 20.44.120 each require that the decision of the Responsible Official shall be entitled to "substantial weight". Having reviewed this "substantial weight" rule, the Washington Supreme Court in Norway Hill Preservation Association v. King County, 87 Wn 2d 267 (1976), determined that the standard of review of any agency "negative threshold determination" is whether the action is "clearly erroneous". Consequently, the administrative decision should be modified or reversed if it is:

...clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order.

8. **Conclusions Adopted.** Any portion of any of the following conclusions which may be construed as a finding is incorporated here by reference.

#### CONCLUSIONS:

1. Any portion of any of the preceding findings which may be construed as a conclusion is hereby adopted as such.
2. As noted in Finding No. 7, above, the burden of proof falls on the Appellant in a threshold determination appeal. Considering the preponderance of the evidence, the Appellant has not successfully borne that burden in this case. Considering the above findings of fact and the entire hearing record, it must be concluded that the Department's threshold determination in this matter *is not clearly erroneous* and therefore cannot be reversed.

The presentation of issues, questions and concerns is not sufficient to overturn a threshold determination. Rather, the determination (and the appeal review of that determination) must be based upon the preponderance of the evidence. The preponderance of the evidence in this case supports the Department's determination.

3. In addition, the following conclusions apply:

A. There is no indication in the record that the Department erred in its procedures as it came to its threshold declaration of non-significance. Rather, the Appellant differs with the Department's assessment of impacts or the probability of potentially adverse impacts. Speculation with respect to potential impacts cannot prove a probable significant impact that requires the responsible agency to be overruled or to alter its initial determination.

B. Although the Appellant argues that the information on which the Department based its determination was insufficient, there is no adequate demonstration that the information on which the Department based its determination is actually erroneous.

C. There is a substantial amount of information in the record regarding the various impacts which have been asserted by the Appellant. The Department has not been unaware of these issues and has investigated (and reinvestigated) them, but has arrived at conclusions which differ from the Appellant's. The Department, having had access to the variety of issues and points of view and information expressed by the Appellant and others, maintains its original determination of non-significance. The Department's judgment in this case must be given substantial weight.

D. In view of the entire record as submitted and in view of the State Environmental Policy Act, the Department's decision is not clearly erroneous and is supported by the evidence.

DECISION:

- A. The November 18, 1997 Transportation Concurrency Determination entered By King County Department Of Transportation, is AFFIRMED.
- B. The July 17, 1998 SEPA Threshold Determination entered by the Department of Development and Environmental Services is AFFIRMED. The appeal is DENIED.

ORDERED this 18<sup>th</sup> day of February, 1999.

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R. S. Titus, Deputy  
King County Hearing Examiner's Office

TRANSMITTED this 18<sup>th</sup> day of February, 1999, to the following parties and interested persons:

Richard Aramburu  
Betty & Pat Berg  
Joanna Buehler  
Tim Cowin  
Barbara Elliot

Allen Flintoff  
Terry Gray  
Tom Harle  
David and Lina Hines  
Janet Irons

Robert Johns  
Kathy Johnson  
Leslie Kralicek  
De-En Lang  
Harvey Hiller



Gary Minton  
 Sherri Miyazaki  
 Michael Monroe  
 Lester Ordway  
 Bob Parrott  
 Jill Porter  
 Michael Read

James Rich  
 Tom Smayda  
 Ilene Stahl  
 Todd Thull  
 James C. Wills  
 Rebecca & Bill Wright  
 Mason Bowles

Dick Etherington  
 Willis Mansfield  
 David Mark  
 Aileen McManus  
 Angelica Velasquez

MINUTES OF THE FEBRUARY 2 AND FEBRUARY 3, 1999 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT & ENVIRONMENTAL SERVICES FILE NO. B98C0011 - COLINA SQUARE APARTMENTS:

R.S. Titus was the Hearing Examiner in this matter. Participating in the hearing were Angelica Velasquez, Willis Mansfield, Mason Bowles, Aileen McManus, Dick Etherington, David Mark, Dennis McMahon, Robert Johns, Ilene Stahl, Todd Thull, Sherri Miyazaki, Joanna Buehler, Barbara Elliott, David Hines, Allen Flintoff, Kathy Johnson, Bill Wright, Harvey Miller, Tom Smayda, Tom Harle, Bob Parrott, Leslie Kralicek, and Michael Read.

The following exhibits were offered and entered into the record:

*Entered at October 27, 1998 Pre-Hearing Conference:*

Exhibit No. A Colina Square site plan dated June 24, 1998

*Entered February 2, 1999:*

- Exhibit No. 1 Department of Development and Environmental Services Preliminary Report to the Hearing Examiner for the February 2, 1999 public hearing
- Exhibit No. 2 Mitigated Determination of Nonsignificance (MDNS) for Colina Square Apartments issued July 17, 1998
- Exhibit No. 3 Environmental Checklist dated March 19, 1997
- Exhibit No. 4 Appeal of MDNS for Colina Square received August 7, 1998
- Exhibit No. 5 Drainage Computations & Technical Information Report for Colina Square prepared by Bob Parrott, P.E., dated October 1997
- Exhibit No. 6 East Lake Sammamish Basin and Nonpoint Action Plan
- Exhibit No. 7 Southeast Wetland Drainage Report for the Preliminary Plat of Todd's Landing, dated January 10, 1992
- Exhibit No. 8 Todd's Landing Technical Information Report, dated December 18, 1992, revised April 5, 1993
- Exhibit No. 9 Road and Storm Plan for Todd's Landing dated November 8, 1996
- Exhibit No. 10 Revised Site Plan for Colina Square, not dated
- Exhibit No. 11 (1-34) Appellant's Notebook of Exhibits
- Exhibit No. 12 DDES Field Investigation of Drainage with photos and site plan attached

*Entered February 3, 1999:*

- Exhibit No. 13 Letter dated January 14, 1999 to Robert Johns from Bob Parrott re: downstream analysis
- Exhibit No. 14 Letter dated February 2, 1999 to Examiner from Leslie Kralicek, read into record
- Exhibit No. 15 King County Department of Transportation File Summary for 96-05-22-01 and 97-11-12-01
- Exhibit No. 16 King County Department of Transportation Concurrency File for Colina Square